

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ARTERO CLARK,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 315707
Macomb Circuit Court
LC No. 2012-001095-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DEVON HILL,

Defendant-Appellant.

No. 315776
Macomb Circuit Court
LC No. 2012-001094-FH

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, defendant Kevin Artero Clark appeals as of right his jury trial convictions of third-degree home invasion, MCL 750.110a(4), possession of burglar's tools, MCL 750.116, receiving and concealing stolen firearms, MCL 750.535b, receiving, possessing, or concealing stolen property valued between \$1,000 and \$20,000, MCL 750.535(3)(a), felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Clark was sentenced to 10 months to 5 years each for third-degree home invasion, receiving, possessing, or concealing stolen property valued between \$1,000 and \$20,000, and felon in possession. He received 10 months to 10 years for possession of burglar's tools and for receiving and concealing stolen firearms. He received two years for felony-firearm.

Defendant Eric Devon Hill appeals as of right his jury trial convictions of third-degree home invasion, MCL 750.110a(4), possession of burglar's tools, MCL 750.116, receiving and concealing stolen firearms, MCL 750.535b, receiving, possessing, or concealing stolen property

valued between \$1,000 and \$20,000, MCL 750.535(3)(a), felon in possession of a firearm, MCL 750.224f, and felony-firearm, second offense, MCL 750.227b. Hill was sentenced to one day for all of his convictions except felony-firearm, for which he was sentenced to five years.

We affirm defendants' convictions and sentences in both dockets.

I. FACTUAL BACKGROUND

The victim lived in Shelby Township, Michigan, with her son. On February 27, 2012, she and her son were not home from 1:00 p.m. to 8:00 p.m. Her son arrived home at approximately 8:00 p.m., and quickly noticed that something was amiss at the house. He warned his mother not to go inside, and he then called the police.

When the officers arrived, they noticed that the sliding door on the back of the house was open, and pry marks from apparent burglary tools were visible. Several rooms in the house were in disarray. Items missing from the home included jewelry, two guns, and a laptop computer.

An officer in the Macomb County sheriff's office heard the radio transmission about the break-in. Approximately 30 minutes after the call, while on the road, the officer had to slam on his brakes as a Ford Escape pulled out in front of him. The officer followed the car, which pulled into the parking lot of an apartment complex. No one exited the vehicle. The car eventually pulled out of the parking lot, and the police officer initiated a traffic stop.

Hill was driving the Ford Escape, and Clark was in the passenger's seat. Through the windows of the car, the officers observed bags containing jewelry, a laptop carrying bag, and three screwdrivers. During the subsequent search of the car, the officers discovered jewelry, two ski masks, screwdrivers, two long guns, laptops, and six watches. The items were confirmed as those missing from the victim's house. Hill initially claimed that the items in the vehicle must have been placed there by his wife. When Clark was being processed at the jail, the officers discovered a Burberry watch in his pants pocket that also had been taken from the victim's house.

Defendants each were convicted of third-degree home invasion, possession of burglar's tools, receiving and concealing stolen firearms, receiving, possessing, or concealing stolen property valued between \$1,000 and \$20,000, felon in possession, and felony-firearm. Both defendants now appeal.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

In docket no. 315707, defendant Clark argues that there was insufficient evidence of third-degree home invasion, felon in possession of a firearm, felony-firearm, and possession of

burglar's tools.¹ We review “de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor” to ascertain “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotations marks and citations omitted). “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). However, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

B. THIRD-DEGREE HOME INVASION

The elements of third-degree home invasion are: (1) breaking and entering or entering without permission, (2) the entered structure must be a dwelling, and (3) the intent to commit a misdemeanor or the actual commission of a misdemeanor while inside the dwelling. *People v Crews*, 299 Mich App 381, 393-395; 829 NW2d 898 (2013). While mere possession of stolen property is not enough to prove breaking and entering, *People v Olson*, 65 Mich App 224, 229; 237 NW2d 260 (1975), it also is “well established that the jury may infer that the possessor of recently stolen property was the thief[.]” *People v Hayden*, 132 Mich App 273, 283 n 4; 348 NW2d 672 (1984). In other words, if there are other facts or circumstances indicative of guilt, the unexplained possession of stolen property can support a conviction for home invasion. *People v Hutton*, 50 Mich App 351, 357; 213 NW2d 320 (1973). Such facts include whether the defendant is in possession of the property within a short time of the home invasion, or within a close distance to the house. *People v Williams*, 368 Mich 494, 501; 118 NW2d 391 (1962); *People v Gordon*, 60 Mich App 412, 418; 231 NW2d 409 (1975).

In the instant case, there was sufficient evidence that Clark was guilty of third-degree home invasion. The home invasion occurred between 1:00 p.m. and 8:00 p.m. Hill’s vehicle—with Clark inside—was stopped approximately 30 minutes after the break-in was announced on the police radio. Defendants were approximately a half mile from the victim’s house. The victim’s stolen property was located inside the vehicle, as well as two ski masks, and multiple screwdrivers. One of the screwdrivers was bent out of shape, and pry marks were found near the victim’s door. As noted *supra*, when a defendant is found with the stolen property in close proximity and time to the location of the home invasion, such factors are evidence of guilt. Furthermore, while Clark contends that mere presence is not enough to prove guilt, he was not just near the stolen items, but the victim’s stolen Burberry watch was found in his pocket.

Based on the foregoing, a reasonable jury could have concluded that Clark entered the victim’s home without permission and committed a misdemeanor. *Crews*, 299 Mich App at 393-

¹ Clark does not challenge his convictions for receiving and concealing stolen firearms, or receiving, possessing, or concealing stolen property valued between \$1,000 and \$20,000.

395. Viewed in the light most favorable to the prosecution, we find sufficient evidence for Clark's third-degree home invasion conviction.

C. FELON IN POSSESSION & FELONY-FIREARM

Clark next challenges his convictions for felon in possession and felony-firearm. “ ‘[A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state. . . .’ ” *People v Brown*, 249 Mich App 382, 383; 642 NW2d 382 (2002), quoting MCL 750.224f(1). As for felony-firearm, “one must carry or possess the firearm, and must do so when committing or attempting to commit a felony.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis omitted).

The question of possession is one of fact for the jury, and can be established with circumstantial evidence and reasonable inferences arising therefrom. *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). “Possession of a firearm can be actual or constructive, joint or exclusive.” *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). “A person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* (quotation marks and citation omitted). Thus, “[t]he essential question is one of control.” *Strickland*, 293 Mich App at 400.

On appeal, Clark's argument consists of a recitation of caselaw, with no actual analysis of the law as applied to the facts of this case. Thus, we cannot discern his actual argument. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.”).

Furthermore, there was sufficient evidence that he possessed the weapons in this case. There were two guns stolen from the victim's home; both were found in the rear of Hill's vehicle at the time Clark and Hill were arrested. The fact that Clark and Hill were arrested in close time and proximity to the burglarized home—and in possession of the stolen property and burglar's tools—is circumstantial evidence that defendants burglarized the home and transported and possessed the guns during and after the home invasion. A jury could reasonably conclude that possession of the guns was joint, as Clark and Hill perpetuated the crime together. See *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989) (there is “joint firearm possession if the evidence suggests two or more defendants acting in concert.”).

Viewed in the light most favorable to the prosecution, we find sufficient evidence of possession supporting Clark's convictions.

D. POSSESSION OF BURGLARY TOOLS

Lastly, Clark challenges his conviction of possession of burglary tools. “Conviction for possession of burglary tools requires proof that the defendant possessed tools adapted and designed for breaking and entering, that defendant had knowledge that the tools were adapted and designed for that purpose, and that the defendant possessed them with the intent to use them

for breaking and entering.” *People v Wilson*, 180 Mich App 12, 16; 446 NW2d 571 (1989); see also *People v Herron*, 303 Mich App 392, 394 n 1; 845 NW2d 533 (2013). A screwdriver may constitute a burglary tool for the purposes of the possession of burglar’s tools. *People v Olson*, 65 Mich App 224, 229; 237 NW2d 260 (1975).

Sufficient evidence existed for a reasonable jury to convict Clark of possession of burglar’s tools. Several screwdrivers were found in the vehicle when Clark was arrested. One of the screwdrivers was bent out of shape, and there were pry marks near the sliding glass door of the house. Furthermore, as noted *supra*, Clark was found in a vehicle containing the victim’s stolen property, near the time and place of the home invasion, and the victim’s stolen Burberry watch was found in his pocket.²

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence that Clark possessed the screwdrivers for the purpose of the burglary.

III. SEVERANCE

A. STANDARD OF REVIEW

Next, in docket no. 315776, defendant Hill argues that the trial court erred in denying his motion for severance. “Generally, a trial court’s ultimate ruling on a motion to sever is reviewed for an abuse of discretion.” *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009) (quotation marks and citation omitted). “A court abuses its discretion when a decision by the court results in an outcome that falls outside the range of reasonable and principled outcome.” *People v McDonald*, 303 Mich App 424, 434; 844 NW2d 168 (2013).

B. ANALYSIS

MCR 6.121 provides:

(C) Right of Severance; Related Offenses. On a defendant’s motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

(D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence

² While Clark argues that the screwdriver was not a burglary tool because it was just a “garden-variety screwdriver,” that ignores that MCL 750.116 defines a burglar tool as a “tool or implement . . . adapted and designed for . . . forcing or breaking open any building [or] room . . . in order to steal therefrom any money or other property[.]” Thus, regardless of a screwdriver’s normal function, the evidence in this case indicates that it was used to pry open the victim’s door in order to enter her home and steal her possessions.

of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties readiness for trial. [Emphasis in original.]

"Severance is mandated only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995). A defendant must "submit an affidavit or make an offer of proof that persuasively demonstrated that [his] substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice." *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). "Severance is required where the defenses are mutually exclusive or irreconcilable, not simply where they are inconsistent." *McCray*, 210 Mich App at 12. "In other words, the tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *People v Pipes*, 475 Mich 267, 271 n 9; 715 NW2d 290 (2006) (quotation marks and citation omitted).

In the instant case, Hill's counsel stated: "On behalf of Mr. Hill, I will confirm that it would be our trial strategy he would take the stand and part of the defense strategy would be to eliminate his knowledge of the transaction in his presence, which could very well obviously be something that could be expressly used against Mr. Clark." Clark's counsel also asserted that Clark's defense strategy at trial would be that Clark "was picked up and the property was already where it was and they were doing something totally different."

Contrary to Hill's argument on appeal, the defenses were not necessarily irreconcilable. Neither defendants planned to argue that they saw the other commit the home invasion, nor testify about the other's knowledge regarding the stolen nature of the items. Moreover, mere fingerpointing between codefendants is not enough to establish that defenses are mutually exclusive. *People v Hana*, 447 Mich 325, 360-361; 524 NW2d 682 (1994). In other words, "the tension between defenses" was not "so great that a jury would have to believe one defendant at the expense of the other." *Pipes*, 475 Mich at 271 n 9 (quotation marks and citation omitted).³

Furthermore, Hill has not demonstrated that prejudice or fairness demanded severance. MCR 6.121(C) and (D). Neither defendant testified at trial. Instead, counsel for each defendant relied on cross-examination of the prosecution's witnesses and highlighted the lack of eyewitnesses. Thus, defendants failed to present the allegedly mutually exclusive defenses, so the jury was never faced with the choice of deciding between the two. To the extent that Clark's defense strategy may have implicated Hill, "incidental spillover prejudice, which is almost

³ Hill also implies that the charges against Clark were not related to Hill's case. However, related offenses are those based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1). Considering the evidence that Clark and Hill acted in concert when breaking in and stealing items from the victim's home, their offenses were clearly related under MCR 6.120(B)(1).

inevitable in a multi-defendant trial, does not suffice” to justify severance. *Hana*, 447 Mich at 349 (quotation marks and citation omitted). We find no error in the trial court’s ruling.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Hill also argues in docket no. 315776 that he was denied the effective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a “trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court’s factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Unger*, 278 Mich App at 242.

B. ANALYSIS

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that “counsel’s representation fell below an objective standard of reasonableness.” *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that trial counsel’s deficient performance prejudiced his defense, meaning “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687.

Hill contends that his defense counsel was ineffective for failing to call Hill as a witness. Before trial, Hill’s counsel indicated—in the context of asking for the trials to be severed—that Hill would testify. The trial court denied the motion, and Hill did not testify. Nevertheless, the trial court informed Hill that he had the absolute right to testify and that “even if [defense counsel] were to tell you I don’t think you should testify if you disagree with him and you wanted to testify you still could.” Hill indicated that he understood his rights, and it was his decision not to testify. Thus, the record indicates that Hill understood his rights and voluntarily decided not to testify.

Moreover, any decision from trial counsel on this issue was sound trial strategy. The version of events Hill proposed is that Clark loaded a large amount of stolen property into Hill’s vehicle with Hill remaining innocently unaware. Hill’s trial counsel made the reasonable decision not to expose Hill to the pitfalls of cross-examination, and instead chose to highlight the circumstantial nature of the evidence against him.

We also find no error in the failure to call other alleged alibi witnesses. “[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citation omitted).

“Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.*

On appeal, Hill does not identify the witnesses he feels should have been called. Assuming he is referring to the witnesses he identified in his motion to remand, documentary evidence submitted on appeal is not a part of the lower court record and will not be considered by this Court. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). We also note that two of the three documents defendant attached to his motion are not affidavits or notarized documents, but merely letters from defendant’s acquaintances. MCR 7.211(C)(1)(a). None of the individuals indicated their willingness to testify at trial, nor the reason they did not.

Furthermore, even if we were to consider the evidence, Hill cannot overcome the presumption that defense counsel behaved reasonably. The supposed alibi, derived from these witnesses, is incomplete. Hill was unaccounted for part of the relevant time period. Moreover, in light of the overwhelming evidence of Hill’s guilt, we cannot say that any alleged error would have altered the outcome of the trial. “We have previously denied defendant’s request for a remand,” and for the reasons discussed *supra*, “we decline to reconsider defendant’s request.” *Horn*, 279 Mich App at 38.

V. DUE PROCESS

A. STANDARD OF REVIEW

Lastly, in docket no. 315776, defendant Hill argues that he was deprived of his right to due process when the prosecution failed to notify him that he had been charged as a second offender for felony-firearm. “Constitutional questions are reviewed de novo.” *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

B. ANALYSIS

Hill argues that due process was violated because he was not informed of the second-offender status relating to his felony-firearm conviction. This argument is foreclosed by *People v Williams*, 215 Mich App 234; 544 NW2d 480 (1996) and *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997). In *Williams*, this Court distinguished sentence-enhancement provisions—like the felony-firearm provision—from habitual offender statutes. 215 Mich App at 236. We held that “[w]henver sentence enhancement is authorized, due process does not require that the prosecution separately charge the defendant as a second offender, nor is the defendant entitled to an adversarial hearing before the prior convictions are used for sentencing purposes.” *Id.*; *Miles*, 454 Mich at 100. In *Miles*, the Michigan Supreme Court adopted the reasoning that “ ‘ due process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information.’ ” *Id.* at 100, quoting *Williams*, 215 Mich App at 236.

Rather than challenge the accuracy of the information underlying his conviction, defendant merely requests that we overrule *Williams*, *Miles*, and other similar cases in that vein.

However, both *Williams* and *Miles* are binding precedent. MCR 7.215(C)(2) and (J)(1); *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Thus, defendant's argument is meritless.⁴

VI. CONCLUSION

In docket no. 315707, we find that there was sufficient evidence to support Clark's convictions of third-degree home invasion, felon in possession, felony-firearm, and possession of burglar's tools.

In docket no. 315776, we find no error in the trial court's ruling declining to sever the trials. We also find no instances of ineffective assistance of counsel that warrant reversal. Lastly, defendant has not established a due process violation based on the prosecution's failure to inform him of the felony-firearm sentencing enhancement. We affirm in both dockets.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra

⁴ In his reply brief, defendant raises a new argument of ineffective assistance of counsel based on the failure to inform him of the five-year minimum. He did not assert that in his issues presented section nor argument section in his appellate brief. Thus, defendant has abandoned any challenge on this ground. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003).